tion of the United States, preclude the right of the State to assess an ad valorem tax upon its property and a tax upon its net income.

## Argument

It is respectfully submitted by counsel for the Commonwealth tha he principle contended for by it as set out above is well settled and clearly supported by recent decisions of the Supreme Court of the United States, and two short and clear opinions of that court are herein discussed. One case, St. Louis & S. W. Ry. Co. vs. Nattin, 277 U. S. 157, 48 Sup. Ct. 438, supports the property tax, and the other case, United States Glue Co. vs. Town of Oak Creek, 247 U. S. 321, 38 Sup. Ct. 499, supports the income tax.

## The Capital, or Property Tax

In the former case, the railway company owned a line of railroad in Bossier parish, Louisiana, and the tax assessing authorities of that parish undertook to lay an ad valorem tax upon all property within the parish, including the railroad. The railway company sought an injunction against the enforcement of the tax upon several grounds, one being that it was engaged in interstate commerce and that; therefore, the tax was invalid. See report of case below (27 Fed. (2d) 766), where the court said that one of the grounds for injunction against the collection of the tax was that the portion of the taxpayer's line within the parish of Bossier forms a part of an interstate railroad, and said assessment levies an unjust burden upon interstate commerce in violation of Section 8, Article 1 of the United States Constitution. The lower court dismissed the bill and the Supreme Court affirmed that decision, saying:

[fol. 5] "Without doubt a local legislative body, when properly authorized, may lay general ad valorem taxes upon all property within its jurisdiction, including that of common carriers engaged in interstate commerce, without violating the Federal Constitution. That such taxation does not amount to regulation of interstate commerce is settled doctrine."

No authority was cited for that view as "without doubt" it was "settled doctrine".

See also the most recent statement on the subject, Eastern Air Transport, Inc., vs. South Carolina Tax Commission, (decided March 14, 1932,) 52 Sup. Ct. 340, 341, where Chief Justice Hughes said:

"'It is elementary', said the court in New Jersey Telephone Co. vs. Tax Board, 280 U. S. 338, 346, 50 S. Ct. 111, 113, 'that a State may tax property used to carry on interstate commerce'."

With these dogmatic statements by the highest authority to guide this court, it is submitted that there is plain error in the holding of the court below on this point and that the writ of error should be granted on account thereof.

## The Net Income Tax

The leading case on the right of a State to tax the net income derived from interstate commerce is the Glue Company case, supra.

In that case there was an action brought by the United States Glue Company against the Town of Oak Creek, Wisconsin, to recover a sum paid under protest as part of a tax levied and assessed on plaintiff's income. The Supreme Court of the State of Wisconsin overruled the plaintiff's contention "that the portion of the tax that was in controversy, having been imposed upon income derived by plaintiff from interstate commerce, amounted to a burden upon that commerce, contravening the commerce clause of Section 8, of Article 1 of the Constitution of the United States". 161 Wis. 211, 153 N. W. 241, Ann. Cas. 1918 A, 421. "And this is the sole question presented for our consideration," said the United States Supreme Court (38 Sup. Ct. 499), or as the court said again on page 500:

[fol. 6] "Stated concisely, the question is whether a state, in levying a general income tax upon the gains and profits of a domestic corporation, may include in the computation the net income derived from transactions in interstate commerce without contravening the commerce clause of the Constitution of the United States."

The court sustained the tax and in the course of its opinion, said:

"The difference in effect between a tax measured by gross receipts and one measured by net income, recognized

by our decisions, is manifest and substantial, and it affords a convenient and workable basis of distinction between a direct and immediate burden upon the business affected and a charge that is only indirect and incidental. A tax upon gross receipts affects each transaction in proportion to its magnitude and irrespective of whether it is profitable or otherwise. Conceivably it may be sufficient to make the difference between profit and loss, or to so diminish the profit as to impede or discourage the conduct of the commerce. A tax upon the net profits has not the same deterrent effect, since it does not arise at all unless a gain is shown over and above expenses and losses, and the tax cannot be heavy unless the profits are large. Such a tax, when imposed upon net incomes from whatever source arising, is but a method of distributing the cost of government, like a tax upon property, or upon franchises treated as property; and if there be no discrimination against interstate commerce, either in the admeasurement of the tax or in the means adopted for enforcing it, it constitutes one of the ordinary and general burdens of government, from which persons and corporations otherwise subject to the jurisdiction of the states are not exempted by the federal Constitution because they happen to be engaged in commerce among the states."

and again:

"And so we hold that the Wisconsin income tax law, as applied to the plaintiff in the case before us, cannot be deemed to be so direct a burden upon plaintiff's interstate business as to amount to an unconstitutional interference with or regulation of commerce among the states. It was measured not by the gross receipts; but by the net proceeds from this part of plaintiff's business, along with a like imposition upon its income derived from other sources, and in the same way that other corporations doing business [fol. 7] within the state are taxed upon that proportion of their income derived from business transacted and property located within the state, whatever the nature of their business."

So it is shown that the denial by the lower court of the right to assess the income tax was erroneous and, therefore, a second ground for granting the writ herein.

## Contra-Authorities

Counsel for respondent asserted in the lower court that the mere fact that the respondent was engaged in interstate commerce deprived Virginia of the right to impose any taxes upon the corporation's property or income and a number of cases were referred to by respondent's counsel as being authority in support of their views, but after a careful examination we have been unable to find a single case supporting the taxpayer's views and it is believed that upon the analysis of the cases that may be cited it will be found that each of them involves a franchise tax or a license tax.

For example, two of the cases strongly relied upon in the lower court are Philadelphia, etc., Mail Steamship Co. vs. Pennsylvania, 122 U. S. 326, 30 L. Ed. 1200, and Ozark Pipe Line Corporation vs. Monier, 266 U. S. 555, 45 Sup. Ct. 184. In each of these cases the Supreme Court of the United States refused to sustain a State tax and it was argued by counsel for the respondent in the lower court that the first case referred to was authority for the proposition that Virginia could not impose a net income tax upon the respondent and that the second case referred to was like authority against the imposition of the capital tax. It is submitted that the taxes involved in the two cases referred to are so clearly distinguishable from the taxes involved in the instant case that the opinions should have no weight in the decision of the instant case. In the Philadelphia Mail Steamship Company case the Supreme Court said in the beginning of its opinion:

"The question in this case is whether a State can consti-tionally impose upon a steamship company, incorporated under its laws, a tax upon the gross receipts of such company derived from the transportation of persons and property by sea, between different States and to and from foreign countries."

and again at page 341:

"The tax in the present case is laid upon the gross receipts for transportation as such. * * * They are taxed [fol. 8] not only because they are money, or its value, but because they were received for transportation. No doubt a shipowner, like any other citizen, may be personally taxed

for the amount of his property or estate, without regard to the source from which it was derived, whether from commerce or banking, or any other employment. But that is an entirely different thing from laying a special tax upon his receipts in a particular employment. If such a tax is laid, and the receipts taxed are those derived from transporting goods and passengers in the way of interstate or foreign commerce, no matter when the tax is exacted, whether at the time of realizing the receipts, or at the end of every six months or a year, it is an exaction at the commerce itself, and is a burden upon it, and seriously affects it."

In the instant case the respondent, like all other corporations, was "taxed for the amount of its property, without regard to the source from which it was derived" and as seen from the above quotation such a tax is approved by the Supreme Court of the United States.

If the Imperial Coal Sales Company, Incorporated, had withdrawn from interstate commerce and had during the years in question engaged solely in intra-state commerce, the tax would have been nevertheless the same.

In the Ozark case, the court said at page 562:

"The tax is one upon the privilege or right to do business,"

and the court refused to sustain a privilege tax upon a corporation engaged solely in interstate commerce. We do not need authority from the United States Supreme Court to tell us that such a privilege tax could not be imposed upon the respondent. This honorable court has already clearly announced the same doctrines in Castner, Curran and Bullitt, Incorporated, vs. Commonwealth, 138 Va. 81, 121 S. E. 894, where a State license tax on a business very similar to respondent's was held invalid.

## Conclusion

It is respectfully submitted that neither the imposition of the capital tax nor the imposition of the income tax is such an interference with interstate commerce as to constitute a burden thereon in violation of the provisions of the Constitution of the United States; that the decisions of

the Supreme Court of the United States dealing directly [fol. 9] with the questions of law involved herein clearly and unquestionably show that the lower court erred in holding that each tax was erroneous.

Wherefore your petitioner prays that a writ of error and supersedeas be granted herein in order that the matter may be fully argued before and considered by this honorable court, and that the judgment complained of may be reversed, and counsel for the petitioner herein desires to state orally to the court their reasons for reviewing the decision complained of, and further prays that reasonable opportunity may be allowed them therefor.

In the event that a writ of error be awarded herein the Commonwealth adopts this petition and the argument in support thereof as the brief for the Commonwealth.

Counsel for the Commonwealth aver that a copy of this petition and brief in support was, upon the 5th day of May, 1932, mailed to the opposing counsel in the trial court.

Respectfully, W. W. Martin, Henry R. Miller, Jr., Counsel.

I, Henry R. Miller, Jr., an attorney practicing in the Supreme Court of Appeals of Virginia, do hereby certify that in my opinion there is error in the judgment and order entered on the 29th day of January, 1932, in the Circuit Court of the City of Lynchburg, Virginia, in favor of Imperial Coal Sales Company, Incorporated, against the Commonwealth of Virginia, as set forth in the foregoing petition, for which the same should be reviewed by the Supreme Court of Appeals of Virginia.

Henry R. Miller, Jr., Attorney.

Rec'd May 5, 1932.

H. S. J.

ORDER ALLOWING WRIT OF ERROR

Writ of error allowed and supersedeas awarded. No bond required.

Jos. W. Chinn.

June 4, 1932.

Received June 4/32. H. S. J.

[fol. 10] IN CORPORATION COURT OF CITY OF LYNCHBURG

[Caption omitted]

ORDER FILING PETITION—Sept. 7, 1931

On motion of the Imperial Coal Sales Company, Inc., and it appearing that C. H. Morrisett, State Tax Commissioner, and W. T. Spencer, Jr., attorney for the Commonwealth, have had due notice, the Petition of the Imperial Coal Sales Company, Inc., is filed and it is ordered that this matter be docketed for hearing.

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IN CORPORATION COURT OF CITY OF LYNCHBURG

PETITION

To the Judge of the Corporation Court for the City of Lynchburg, Virginia:

Your petitioner and applicant, Imperial Coal Sales Company, Inc., respectfully shows that it is a corporation organized under the laws of the State of Virginia, with head office in Lynchburg, and that it is aggrieved by an assessment of tax on capital, said tax amounting to $1,579.69, and on income, said tax amounting to $158.34 for the years 1928, 1929 and 1930, and which assessments were made by the Department of Taxation of the Commonwealth of Virginia, within one year from the date of this application. Applicant is advised and insists that said assessments and taxes thereon levied are improper and erroneous and that the same should be corrected.

Applicant asks, therefore, that an order may be entered correcting the said assessment and exonerating applicant from the payment of tax so assessed, and that in the event the same, or any part thereof, shall have been paid, the said order shall direct that said sum or sums be refunded.

Respectfully submitted, Imperial Coal Sales Company, Inc., by Counsel. Jas. R. Caskie, F. P. Christian, Jr., p. q.

[fol. 11] IN CORPORATION COURT OF CITY OF LYNCHBURG

ORDER TRANSFERRING CAUSE—Sept. 19, 1931

The Judge of this court being so situated as to render it improper, in his opinion, to preside at the trial of this case, and with the consent of said parties by their attorneys, it is ordered that this case be transferred to the circuit court of the city of Lynchburg to be further proceeded with according to law.

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IN CIRCUIT COURT OF LYNCHBURG

JUDGMENT—Dec. 12, 1931

This day came the parties by their respective counsel and this cause having been duly docketed and set for hearing on the 23rd day of October, 1931, came on to be heard by the court without a jury, as agreed by counsel, upon the application and the testimony of witnesses in open court and the exhibits filed by the witnesses, and was argued by counsel.

The court doth certify that the facts proven at the hearing are the facts contained in the certified transcript of the testimony of witnesses and exhibits filed herein, which transcript of testimony and exhibits are to be read with this order and are to be a part of this order as fully and completely as if they were set out herein.

Upon consideration whereof the court is of opinion and doth so order that the applicant, Imperial Coal Sales Company, Incorporated, is required under the law to report to Virginia for taxation its entire net income, and that the income tax complained of which is found on page 209, line 13, of the Corporation Tax Register Sheets for 1931, is correct and valid and should be paid, to which action of the court the Imperial Coal Sales Company, Incorporated, by counsel excepted and prayed that its exception be noted of record, which is accordingly done;

The court is further of opinion, and doth so order, that the tax on capital assessed against the said Imperial Coal Sales Company, Incorporated, for the years 1928, 1929 and 1930, aggregating $1,579.69, assessed on June 19, 1931, against said Company, and which assessment appeared

upon the Corporation Tax Register Sheets for 1930, on page 56, line 4, and which tax has not been paid, was improperly assessed, and doth further order that the said Imperial Coal Sales Company, Incorporated, be and is exonerated from payment thereof, to which action of the [fol. 12] court the Commonwealth by counsel excepted and prayed that her exception be noted of record, which is accordingly done.

It is further ordered that the clerk shall certify a copy of this order to the State Tax Commissioner and a copy to the Comptroller.

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IN CIRCUIT COURT OF CITY OF LYNCHBURG

PETITION FOR REHEARING—Filed Jan. 1, 1932

To the Honorable Don P. Halsey, Judge of the circuit court of the city of Lynchburg:

Your petitioner, the Commonwealth of Virginia, respectfully shows unto your Honor that she is aggrieved by a certain order entered by this honorable court on the 12th day of December, 1931, in the above styled proceeding herein pending, wherein the said Imperial Coal Sales Company, Incorporated, had, under the provisions of Section 410 of the Tax Code of Virginia, made application for the correction of certain State taxes assessed against it and by it alleged to be erroneous, by which said order the said corporation was granted certain redress, to-wit: The said order directed that the tax on capital assessed against the said Imperial Coal Sales Company, Incorporated for the years 1928, 1929 and 1930, aggregating $1,579.69, assessed on June 19th, 1931 against said company, and which assessment appeared upon the Corporation Tax Register Sheets for 1930 on page 56, line 4, and which tax has not been paid, was improperly assessed, and that the said corporation be and it was thereby exonerated from the payment thereof.

Your petitioner further represents that the State Tax Commissioner of the Commonwealth of Virginia has maturely considered the transcript of testimony and the exhibits filed in said proceeding, and after such consideration [fol. 13] is of opinion that the said order of the court, in so far as it granted the redress referred to above, is erroneous.

Wherefore your petitioner prays, in accordance with the statute in such cases made and provided and Section 411 of the Tax Code of Virginia, that a rehearing of the application of the said Imperial Coal Sales Company, Incorporated, be granted, and that the matter be reheard in this honorable court and witnesses examined in the same manner as if no previous hearing had been had, and that upon such rehearing this court shall make such order thereon as may be proper.

Respectfully, Commonwealth of Virginia, Ex Rel State Tax Commissioner. W. W. Martin, Henry R. Miller, Jr., Counsel for State Tax Commissioner.

Richmond, Virginia, 31st day of December, 1931.

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IN CIRCUIT COURT OF CITY OF LYNCHBURG

JUDGMENT—Jan. 29, 1932

This day came the parties by their respective counsel and petitioner filed its particulars of the grounds of its claim. And thereupon the case came on to be reheard without a jury, as agreed by counsel, and upon the petition for rehearing, application and the testimony of witnesses in open court, and exhibits filed therewith, and stipulation of counsel, and was argued by counsel.

The Court doth certify that the facts proven at the hearing are the facts contained in the certified transcript of the testimony and exhibits filed therewith and stipulation of counsel, which are identified by the signature of the Judge of this Court, and are to be read with this order as a part hereof, as fully and completely as if set out herein.

Upon consideration whereof, the Court is of opinion and doth so order, that the Imperial Coal Sales Company, In- [fol. 14] corporated, is not properly assessable with tax on capital assessed for the years 1928, 1929, and 1930, said tax aggregating $1,579.69, assessed on June 19, 1931, against said Company, and which assessment appears upon the Corporation Tax Register sheets for 1930, page 56, line 4, and is likewise not properly assessable with tax on income as assessed on page 209, line 13 of the Corporation

Tax Register sheets for the year 1931, and doth further order that the said Imperial Coal Sales Company, Incorporated, be and is exonerated from payment of the said respective taxes, to which action of the Court the Commonwealth by counsel excepted, and prayed that her exception be noted of record, which is accordingly done.

It is further ordered that the Clerk do certify a copy of this order to the State Tax Commissioner and a copy to the State Comptroller.

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IN CIRCUIT COURT OF CITY OF LYNCHBURG

PLAINTIFF'S PARTICULARS OF ITS CLAIM

The plaintiff, for particulars of its claim, sets up as follows:

I. With reference to tax on capital:

1. The tax assessed in this case is an attempt to tax property which was not and had never been in the State of Virginia, or subject to its jurisdiction, and is thus invalid under the Fourteenth amendment to the Constitution of the United States.

2. That said tax is not properly assessable against Petitioners under Sections 74 and 76 of the Tax Code of Virginia, and is likewise contrary to and prohibited by the provisions of Section 427 of said Tax Code.

3. That the said tax is invalid and contrary to the provisions of clause 3 of Section 8 of the Constitution of the United States, commonly called the Commerce clause, for the following reasons:

(a) Petitioner is engaged solely and only in interstate commerce as a del credere agent for its principals, all residents of the State of West Virginia, and such tax is a burden upon such interstate commerce.

[fol. 15] (b) All the capital of petitioner and all the intangible assets is inseparable from and necessary for the interstate business of the company and used as a means and the instrumentality of such business, and any tax thereon is a direct burden on such business, and is therefore invalid.

(c) All of the alleged assets used in making up the capital assessed against petitioner were the gross proceeds of interstate commerce and as such not taxable by the State of Virginia.

II. As to the assessment on income:

1. There is no provision under the laws of Virginia for the taxation of income of petitioner.

2. The attempt to tax such income is directly contrary to the provisions of the Virginia Tax Code, Section 54 and invalid under Section 76, providing that no domestic corporation shall be taxed more than a foreign corporation engaged in a similar business would or could be assessed.

3. That the income of petitioner is the direct proceeds of interstate commerce and as such is not taxable under the provisions of the Commerce clause of the United States Constitution, above referred to, and any tax thereon is a burden on such commerce.

Caskie, Frost & Coleman, p. q.

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IN CIRCUIT COURT OF CITY OF LYNCHBURG

**Statement of Evidence**

Stenographic report of all the testimony and other incidents, including all the exhibits, or other writings introduced in evidence or presented to the trial Court, and all questions thereon, of the trial of the case of Imperial Coal Sales Company, Inc., vs. Commonwealth of Virginia, which was tried in the Circuit Court of the City of Lynchburg, Virginia, at Lynchburg, Virginia, on the 29th day of January, 1932, before the Honorable Don P. Halsey, Judge of the said Court.

STIPULATION AS TO ASSESSMENTS

It is stipulated by counsel for the parties in the trial of this case, that the property constituting the basis of the assessment on capital were on the dates in question the prop-
[fol. 16] erty of the Imperial Coal Sales Company, Inc., and that the income constituting the basis of the income assessment was income earned by the Imperial Coal Sales Com-

pany, Inc., and that the assessments as made are correct if the Imperial Coal Sales Company, Inc., is subject to any capital or income tax whatever during the years in question by the State of Virginia.

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Evidence Introduced by the Plaintiff

Judge FRANK P. CHRISTIAN, sworn for Plaintiff.

Direct Examination.

By Mr. Caskie:

Q. Please state your occupation, age and residence?

A. In regard to this case or what my general occupation is?

Q. That is a general question.

A. I am Judge of the Corporation Court of the City of Lynchburg, Virginia, and President of the Imperial Coal Sales Co., and am of lawful age and live in Lynchburg.

Q. How long have you been President of the Imperial Coal Sales Co., Inc.?

A. Ever since its organization, but I don't know when that was.

Q. As President of the Imperial Coal Sales Co. are you actively connected with the affairs of the company and keep up with all of its business?

A. Yes, I keep my office in the building adjoining where the books of the company are kept.

Q. Are you thoroughly familiar with the nature of the business of the company?

A. Yes, sir?

Q. Will you please state what is the nature of the business of the Imperial Coal Sales Co.?

A. The Imperial Coal Sales Company was organized under a charter from the State of Virginia for the purpose of selling coal for mines in West Virginia, in interstate commerce, and collecting the proceeds thereof, looking after the shipments of coal, for which it is paid a del credere commission of 8% on the price for the coal.

Q. Does your company represent any Virgina Company?

A. No, sir, we do not own any mines, we do own any coal, haven't any stocks of coal, we have never bought or

[fol. 17] sold any coal, we are merely, as I stated before, agents upon a del credere commission for the sale of coal, none of which has ever been in the State of Virginia.

Q. At the time you make sales of coal where is the coal located?

A. Located in West Virginia.

Q. Just how are your sales conducted?

A. We have traveling salesmen and they go into the Northwest chiefly and sell coal by the wholesale, in carload lots, the orders are sent by the Sales Company to the various collieries, the coal is mined and loaded into cars and is shipped to the purchaser, f. o. b. cars at the point at which it is mined.

Q. Does your company conduct any intra-state business at all?

A. It never has conducted any intra-state business.

By Mr. Miller: We object to the question and answer and move that they be stricken out because that is purely a question of law. The witness say show what he does, but not determine or give as his opinion whether he was conducting intra or infer-state commerce.

By the Court: I think the question is one of fact, and I will overrule the objection.

By Mr. Miller: We desire to except.

By Mr. Caskie:

Q. Does your company sell any coal whatsoever that originates in the State of Virginia?

A. No, sir.

Q. Has it ever done so since its organization?

A. It never has done so.

Q. You spoke of acting as a del credere agent with commission. I assume that you guarantee the solvency of the accounts?

A. That is all. Under our contracts we have to pay the mines on the 20th of each month for all coal shipped the previous month, that is, coal that has passed the scales of the railroad company, and contracts with the purchasers that they shall pay in the same way. If a purchaser does not pay his account by the 20th of the month, the necessities of the coal business are such that we have to advance

the money and then collect from the purchasers. If the purchaser makes any objection to the coal on account of high ash, sulphur or any other cause and the account is not [fol. 18] paid for that reason, it is charged back to the coal companies and they have to pay us back for the coal, but if the purchaser becomes insolvent we guarantee his solvency, and that is all. I would say further that neither the coal nor its proceeds is ever or has ever become a part of the common mass of property in Virginia, which the State of Virginia can tax, unless it violates the 14th Amendment of the Constitution of the United States.

Q. These accounts, as I understand, are collected by your company and remittance made to your principal, but if the accounts are not paid, however, by the 20th of the month after shipment, you advance the amount to your principal?

A. Yes. I would just like to say there in explanation of that that the accounts and books are nothing in the world but a record of our agency transactions. The accounts simply show who the purchaser is and the amount at which the coal is sold.

By Mr. Miller: If Your Honor please, we object to this testimony of the witness as being in violation of the stipulation of counsel, especially if it is introduced for the purpose of showing in any respect anything with respect to the ownership and the accounts and bills and notes receivable and bills and accounts and notes payable.

By Mr. Caskie: The purpose of the testimony is not to raise any question as to the ownership but simply to show the manner in which the business is conducted. Go ahead and explain that, please.

A. We also keep a set of accounts of the coal shipped for the colliery companies, with the colliery companies, and the expenses, and then we have an account on the books that shows our commissions that we receive, our gross and net commissions received for our services. Our capital is not used in business, it is simply a means and an instrumentality whereby we carry on an agency business or we carry on a sales operation.

Q. And all of your business originates in West Virginia, and all of your coal is shipped to other states?

A. Yes, we possibly might ship about 1% of the volume of business, or about that much, into the State of Virginia.

Q. But it comes from the State of West Virginia?

A. Yes, and it is sold in carload lots and never becomes a mass of the property in Virginia.

[fol. 19] Q. Is any coal whatsoever billed or shipped to the Imperial Coal Sales Co. in Virginia?

A. No, I don't know of any case of that kind.

Q. How long has the Imperial Coal Sales Company been in business?

A. It was formerly a West Virginia chartered company and I cannot say exactly when it was moved to Virginia, possibly 1922 or 1923.

Q. You then took out a Virginia charter?

A. Yes, sir.

Q. Has there been any taxation on your capital up to the year 1930, by the State of Virginia?

A. No, it has never been taxed before. I mean by that, we pay a franchise tax on the capital but the capital has never been undertaken to be taxed as capital in business before.

By Mr. Miller: If Your Honor please, I object to the testimony of the witness insofar as it relates to any assessment on capital for any of the tax years prior to the tax assessment here of 1928, for the reason that such testimony is irrelevant and immaterial to the issues in this case.

By Mr. Caskie: The purpose of the question is simply to show the previous construction of the Tax Department itself of the statute.

By Mr. Miller: With respect to what years?

By Mr. Caskie: The years 1928 and 1929.

By Mr. Miller: Insofar as the question relates to any assessment prior to the year 1928, I still make the same objection.

By the Court: Do you concede that the tax was the same in the previous years as it was in 1930?

By Mr. Miller: I am not prepared to say as to that.

By the Court: Unless that is done, I think it is relevant.

By Mr. Miller: Section 73 of the Tax Code was amended by Acts of 1928, at page 738, and it *now* reads in the first sentence "all capital of any trade or business. Prior to the amendment of the statute,"—I think, but I am not now reading from the statute itself, but it is my recollection that the amendment was "all capital used in any trade or business," and I make the same objection.

By the Court: Will you please state that again?

By Mr. Miller: Section 73 as amended in 1928, and as it now reads in the first sentence of it is "all capital of any trade or business of any person, firm &c." Prior to the [fol. 20] amendment the statute read, as I recall it "all capital used in any trade or business," and there was a distinction in the decision of some Courts between the phrases used in the old and new statute. It was contended that the capital had to be actually used in the business in order to be liable under the old statute, consequently the legislature was asked to amend the statute so that it is now made to read "all capital of any trade or business," and I think it follows from the amendment that it does not now have to be shown that the capital is actually used in the business, if it belongs to the person or firm, it is, under the law, subject to the tax as capital. That is, as I understand it, the distinction between the old and new law. This witness is now testifying as to assessments against the Corporation on account of capital for the years prior to the amendment and I think the assessments or failure to assess for those years is immaterial to the issues in this case, and I move that his testimony be stricken from the record.

By Mr. Caskie: As applicable to the years prior to 1928?

By Mr. Miller: Yes.

By Mr. Caskie: I think it is a proper question and ought to be allowed. Our contention is if the company is taxable under the present statute it was likewise taxable under the previous statute.

By the Court: Is it your contention, Mr. Miller, that the difference in the language of the statute is such that you could not tax capital used in business before?

By Mr. Miller: No, sir, I think under the old law that we could have taxed capital of a trade or business even though it had not been actually used in the business, and the same question had been raised as to the power of the State to make that assessment and the amendment was to relieve that question. Aside from that, I think what the State did prior to 1928 with respect to this corporation has nothing whatever to do with what the State has a right to do now, to assess it. I do not think the assessment or failure to assess the capital of any corporation prior to 1928, which is the first year involved in these assessments complained of,

has anything to do with the right of the state now to make this assessment that they have made.

By the Court: I will let the question be answered and get the facts in the record and reserve the point to be decided later as to whether or not it is relevant.

[fol. 21] By Mr. Caskie: He has already answered my question. Now I want to introduce the assessments.

A. Mr. Tufts made out this statement and there is no question about their being correct.

By Mr. Miller: That is what I understand, and that is the reason I did not think it necessary to prove the assessments. We are stipulating they are correct and they are mentioned in the application.

By Mr. Caskie: Well, I do not know that it makes any difference.

Q. Now, Judge Christian, when you were notified of the assessment on capital and on income, did you at once protest?

A. Yes, I carried on quite a correspondence, at least Mr. Tufts did at first, and then I took it up with Mr. Morrisett, but I did not get anywhere.

By Mr. Miller: I object to the answer as being irrelevant and immaterial and move that it be stricken from the record.

By the Court: What is the relevancy of that?

By Mr. Caskie: I just want to show that he has been improperly assessed.

By the Court: He has answered that part without objection.

By Mr. Miller: Will Your Honor rule on my motion to strike from the record Judge Christian's testimony as to correspondence between himself and the officers of the Department of Taxation with respect to these assessments subsequent to the assessment?

By the Court: I think he has a right to state that he protested against the assessments. You do not object to that do you?

By Mr. Miller: I do not object to the statement that he protested, if that is the whole purpose of the testimony.

By Mr. Caskie: That is all it is.

By the Court: That is all right, then, just proceed.

By Mr. Caskie:

Q. Does your company maintain any office except the Lynchburg office?

A. Yes, we maintain an office at Cincinnati, and I think we used to maintain one at Chicago, but whether that was [fol. 22] maintained in Chicago at the time this assessment was made, or not, I don't know.

Q. Were the most of your sales made at Cincinnati or the Lynchburg office?

A. Most of the sales are made from the Cincinnati office.

Q. Do they have to come to your Lynchburg office for approval?

A. Sometimes they do, and sometimes they do not. It is hard to say. Some of the sales are made by Mr. Lynch Christian, General Manager, of by-product coal, some of the sales are made by him in Chicago, but that is generally an annual or longer time contract, and he makes that contract.

Q. Would you have any need for any considerable capital at all but for guaranteeing the solvency of these accounts?

A. No, but the companies would not give us their business unless we had capital enough to protect them against any losses, in turning over the coal to us, and the buyers of coal would not deal with us unless we had some capital to protect them.

Q. Where does the bulk of the coal sold by you go?

A. I would say 75% of the coal goes to the blast furnaces.

Q. In what territory?

A. In Illinois, Indiana and Ohio.

Q. Has your company any property in Virginia at all, except what is in its office in Lynchburg?

A. Nothing but its office business and its books.

Q. Does your company do any business at all except coal sales agency business?

A. None at all.

Q. Do you have any income except from this coal sales business?

A. None at all. Our commissions received from interstate commerce is the only thing that we have.

Cross-examination.

By Mr. Miller:

Q. Your corporation has very broad powers in its certificates, has it not?

A. Yes, but we never have exercised them, though.

Q. It has the power to buy and sell coal, does it not?

A. Yes, but we never have exercised it.

Q. How is your coal sold; by written contract, is it not?

A. Sometimes we may sell a car without a written contract but it is generally by a written contract.

[fol. 23] Q. And your relationship with the mines is by virtue of written contracts, is it not?

A. Yes, sir.

Q. Have you copies of those contracts, if so, I will ask that they be produced and filed in the record.

A. I haven't got copies of all the contracts.

By Mr. Caskie: Mr. Miller, they are in the previous record and we herewith file a copy of the contract dated November 1, 1926, made between Imperial Colliery Company and Imperial Coal Sales Company, Inc., and ask that it be made a part of the record and marked Exhibit "A".

By Mr. Miller: I understand that will be copied in this record.

By Mr. Caskie: Yes, sir.

(Said contract is here filed, and is marked Exhibit "A" and is as follows:)

EXHIBIT "A"

This agreement, made and entered into this 1st day of November, 1926, by and between Imperial Colliery Company, a corporation created and existing under the laws of the State of West Virginia, hereinafter called the Coal Company party of the first part and the Imperial Coal Sales Company, Inc., of Lynchburg, Virginia, organized and existing under the laws of the State of Virginia, hereinafter called the Selling Company, party of the second part.

Witnesseth

First: That the Coal Company hereby makes and appoints the selling company its exclusive agent for the period

from November 1st, 1926, to October 31, 1927, for the sale of all coal that may be produced by said Coal Company during said term, and this contract shall continue in force from year to year unless cancelled by either party, by notice in writing given three months before date of expiration.

Second: The Coal Company agrees that it will pay or allow the Selling Company a commission of 8% of the selling price of all coals sold by said Selling Company, said selling price being based upon a net ton of 2,000 pounds, f. o. b. mines of the Coal Company, but said commission [fol. 24] shall in no case be less than 10c per net ton. However, in cases where contracts are made, special agreements as to commissions may be entered into.

Third: The Selling Company agrees to act as exclusive agent for said coal company in accord with the terms of this agreement during the life thereof, and to market its coal in such manner as to secure to the coal company the best possible market and contract price for said coal. The coal company reserves the right to fix, from time to time, the minimum price at which the coal can be sold.

Fourth: The Selling Company hereby guarantees the Coal Company against loss through the insolvency of any purchaser to whom coal is delivered by the coal company under this contract. It is distinctly understood and agreed however, that the selling company shall not be responsible for claims made by customers arising or alleged by customers to be due on account of any act or Commission of the Coal Company, nor will the Selling Company be required to pay for coal in any case where the obligation of the purchaser to pay for the same shall be in dispute on the grounds that the covenants and conditions of any sales have not been fulfilled by the Coal Company, and in event that payment shall already have been made by the Selling Company to the Coal Company, for coal delivered to a customer before such dispute shall have arisen, the Selling Company may withhold payment of the amount in dispute from the monies of the Coal Company thereafter coming into its possession until such dispute shall have been finally settled. Further, it is understood and agreed that the Selling Company does not guarantee the fulfillment by any customer of his obligations to accept deliveries of coal, or the

performance by any customer of any of the other terms and conditions of the contract of sale, except the payment for coal delivered to and accepted by the customer when payment is not made by reason of the insolvency of the customer to whom coal is delivered.

It is further understood and agreed that in the event of the credit of any customer becoming impaired, the Selling Company may (unless his liability to guarantee such customer's account against insolvency as aforesaid be expressly waived by the Coal Company) suspend or cancel the delivery by the Coal Company of further coal to such customer.

Fifth: The Selling Company further agrees to furnish [fol. 25] promptly to the Coal Company prices at which it may sell any coal of said coal company, and to furnish it any other memoranda or orders or contracts showing delivery and other essential terms.

Sixth: In event the Selling Company shall fail to keep the Coal Company supplied with orders for all coal which may be produced, the Coal Company shall have the right to sell any coal, for which it shall have no orders or contracts from said Selling Company, in the open market, provided however, that the Coal Company shall not make or accepted any contracts or orders for the sale of such coal for a period of more than 15 days at a time. Nor can the coal company offer any coal for sale at a price less than the price demanded from the Selling Company.

Seventh: The Coal Company hereby appoints the Selling Company its true and lawful attorney to collect by any proceeding at law or in equity all accounts due for coal sold under this contract, hereby authorizing and empowering the Selling Company to sue therefor in the name of the Coal Company, and the Coal Company further agrees to make, execute and deliver to the Selling Company, on demand, any further powers of attorney, or any assignments, or other documents that may be required by the Selling Company for collection of any account due from any purchaser. The Coal Company shall pay all costs of litigation which may arise from any cause with any customer, except the expense of collecting for coal actually delivered, where payment is not withheld by reason of any alleged act of the Coal Company, and the expense of collecting such accounts shall

be borne by the Selling Company. In all litigations the Coal Company shall have the right to be represented by its own counsel at its own expense, in addition to such counsel as is chosen by the Selling Company.

Eighth: The Selling Company agrees to pay the Coal Company on or before the 20th day of each month the amount due for all coal shipped by the Coal Company during the receding month for which railroad weights have been received on or before the 5th day of the current month. The Coal for which railroad weights have not been received by said date shall be carried to the following month, or until such time as the weights are received.

[fol. 26] Ninth: It is understood and agreed between the parties hereto that shipments of coal by the Coal Company may be prevented or delayed by reason of strikes, lockouts, shortage of car supply, or other causes beyond the control of either party; that the marketing of coal and the prices obtainable therefor are largely dependent upon business and weather conditions; that it is not the intention of this agreement to hold either party responsible for failure to comply with the terms hereof when such failure is beyond the control of either party, but that each party will use its best efforts in any event to perform fully this agreement.

Tenth: It is understood that railroad weights are to govern all settlements.

Eleventh: The Coal Company agrees to make every reasonable effort to prepare, clean and ship coal of the standard of quality and excellence that will give satisfaction to the general trade.

Twelfth: It is agreed that the Coal Company shall have access to the books, papers, orders, &c., pertaining to sales of coal for said Company, and that said Selling Company shall have access to all books, papers, orders, &c., pertaining to the sale and production of coal by the Coal Company.

Thirteenth: The Selling Company agrees to furnish the Coal Company a monthly statement of account.

Fourteenth: In event the Coal Company shall sell its mines, this contract will cease, effective the date of sale. The coal shall, however, complete all contracts and orders accepted by the Coal Company before the sale.

It is further provided that in event this contract is cancelled at its date of termination in any year by the required three months notice in writing, that the Coal Company shall complete all contracts and orders that have been accepted by the coal company prior to receipt of said notice.

In witness whereof, the said parties have caused their respective names to be signed to this agreement by their respective officers thereunto duly authorized, as of the day [fol. 27] and year first above written, this agreement being thus executed in duplicate.

Imperial Colliery Company, by Frank P. Christian, Pres.

Attest:

Charlotte Rode, Secy.

Imperial Colliery Company, by C. Lynch Christian, General Manager."

Attest:

Charlotte Rode, Secy.

By Mr. Miller:

Q. Is the contract to which you have just testified still in force and effect?

A. I think so, I think it provides that it shall be in force unless thirty days' notice is given.

Q. On page 21 of the old record there is this provision in the contract: "It is further provided that in event this contract is cancelled at its date of termination in any year by the required three months notice in writing, that the Coal Company shall complete all contracts and orders that have been accepted by the Coal Company prior to receipt of said notice."

Your company have never given the Colliery Company any notice of cancellation, have you?

A. No, we have not.

Q. And you have never received any notice of cancellation from the Colliery Company?

Q. Are your contracts with the other mines in the same general terms as the one of the Imperial Colliery Company?

A. Yes, that is a standard contract that is used by all sales agencies of coal.

Q. You have a uniform contract of sale for coal, have you not, if so, will you please produce a copy of it?

A. I haven't got a copy of it; I did not know you wanted it.

Q. On page 26 of the old record, I think there is a copy.

[fol. 28] A. The contract depends upon the agreement between the buyer and the company as agent for the seller.

By Mr. Caskie:

Q. You did have a general form?

A. Yes.

By Mr. Miller:

Q. Will you introduce as Exhibit "B" a copy of such contract?

(Said contract is here filed, is marked Exhibit "B" and is as follows:)

EXHIBIT "B"

Contract

Imperial Coal Sales Company, Inc., General Offices: Lynchburg, Va., Western Offices: Union Central Bldg., Cincinnati, O.

This contract made and entered into the — day of ———, 19— by and between the Imperial Coal Sales Company, Inc., party of the first part, and — party of the second part.

Witnesseth: That the party of the first part has this day sold to the party of the second part and the party of the second part has this day purchased from the party of the first part under the terms and conditions as hereinafter set forth:

Quantity: —.
Grade: —.
Price: —.
Delivery: —.
Consignee: —.
Destination: —
Route: —.

Equipment: —.

Effective — day of —— 19—; expiration date — day of ——, 19—.

[fol. 29] Terms of payment: Cash on or before the 20th of *the 20th of* the month following shipments. The right is especially reserved by the party of the first part to cancel this contract whenever said party of the first part has reason to believe that the credit of the party of the second part has been impaired.

Weights: Actual railroad weights of initial road ascertained at the usual point at which carload shipments from the mines shipping hereunder are weighed are to govern settlements.

It is understood between the parties hereto that the party of the first part has entered into, and may hereafter enter into a number of contracts substantially similar to this one and has obligations with other buyers and consumers of coal, and that this contract shall have equal rights with said other contracts and obligations.

Every effort will be made for the prompt and faithful fulfillment of this contract, but neither party hereto made a part will be held responsible for same, during any war or hostilities affecting it, or if prevented or hindered by strikes, partial or general, or combination of workmen, or accidents at mines or works, or hinderance or interruptions of transportation, or by any cause or any occurrence beyond their control. In such case the obligation of either party hereto made a part for a delivery or acceptance of coal under this contract may suspend or reduce to any extent corresponding to the duration of such cause, occurrence or interruption and no liability shall be incurred by either party for damages resulting therefrom.

Should the present scale of wages for mining be altered by the United States Government, State Legislation, or any other agency beyond the control of the party of the first part, said party of the first part shall benefit by such increase or sustain such reduction, as the case may be, during the period within which such alterations are in effect.

Other Terms and Conditions

In witness whereof, the parties hereto have signed this contract the day and year above written. This agreement

effective when accepted by the buyer, approved and signed [fol. 30] by an executive officer of the Imperial Coal Sales Company, Inc., in triplicate.

Imperial Coal Sales Company, Inc., by —— ——.

—— ——, Buyer, by —— ——.

Approved:

—— ——.

Q. Will you tell me what agreement you refer to above?

A. If I was to come down and sell you a lot of coal, it would depend whether I used that contract, or not, on how you wanted the coal shipped and wanted to pay for it, how long you wanted it to run, whether you wanted a time contract, but this is just a general form used in all sales business.

Q. I take it that you mean you would fill out the blank spaces in this form in accordance with the individual case?

A. No, take for instance in the case of the Inter-Lake Coal & Iron Company, I have a contract that is written out to suit the parties.

Q. Will you let me have a copy of that?

A. I cannot do that.

By Mr. Miller: Then I object to any testimony with respect to any other contract other than the contract introduced as a general form of contract.

A. I cannot tell you what is the general contract upon which every pound of coal is sold.

Q. I did not ask you to.

A. I cannot tell you that.

By Mr. Caskie: I don't know what he wants with this contract. What has that to do with this case?

By Mr. Miller: I want to show the general relationship that exists, or has existed during the years in question between the buyers and consumers of coal and the sales company.

By Mr. Caskie: He has testified to that and has introduced a general form of contract which he uses.

[fol. 31] By Mr. Miller:

Q. Are there any agreements in existence between the Sales Company and any other buyers of coal or any buyers

of coal other than the general agreement and provisions contained in Exhibit "B" with your testimony?

A. I cannot tell you.

We sell 240,000 tons of coal a year and I cannot tell you about all the details of those specific contracts.

Q. Are those contracts in the same general terms as Exhibit "B".

A. I don't know whether they are, or not; they are generally so.

By Mr. Caskie:

Q. So far as the question of the manner in which your company sells coal for the mines, are all contracts similar, that is, do you always sell to be shipped direct from the mines to the purchaser?

A. Yes, sir.

By Mr. Miller: I object to the witness attempting to interpret a contract unless the contract is introduced in evidence.

By Witness: I am not interpreting the contract, I am stating to you facts.

By the Court: I think it is a question of fact.

By Mr. Miller: I desire to except.

By Mr. Miller:

Q. Do all the contracts for the sale of coal contain this provision, that the party of the first part (that is the Sales Company) has this day sold to the party of the second part (That is the consumer or buyer) and the party of the second part has this day purchased from the party of the first part, under the terms and conditions as hereinafter set forth?

A. Yes, I suppose so, as we are selling the coal.

Q. Can you say whether or not they do contain that general provision?

A. I think so, that is the spirit of the contract and the purpose of the contract.

Q. Anywhere in the contract between your sales company and the buyers of coal is there any reference made to the Imperial Colliery Company, Inc.?

A. Sometimes the purchaser, in case of some large pur- [fol. 32] chases, require the contract to be approved by the

seller, for the purchaser knows we do not own a pound of coal, and that we are selling it for a principal sometimes undisclosed to them, but always, in every case of a large purchase, they know that we are simply agents. That is the course of business.

Q. Is there any mention in the contract constituting the sales contract between yourself and the consumers of coal, of the name Imperial Colliery Company, Inc.?

By Mr. Caskie: He has answered that already.

A. Yes, sometimes I told you it is, and if you will see there it is provided that it shall come from Imperial By-Product Coal which comes from Burnwell, West Virginia.

Q. Will you take that copy of the contract, Exhibit "B", and state in what manner reference would be made therein to the Imperial Colliery Company?

A. Yes, quantity, grade of coal, price, delivery, consignee, destination, route, equipment.

Q. Have you yet shown any mention of the Imperial Colliery Company?

A. Not at all, it is not necessary for me to tell you anything about the Imperial Colliery Company.

Q. Will you please take Exhibit "B", introduced in evidence, and state if there is any reference to the Imperial Colliery Company in any such manner as it might be inserted in event it represented an actual contract with any one of your consumers?

A. It can be put on the bottom of the contract here, approved by the consumer, whether it is the Southern Smokeless Coal Company or Imperial Smokeless Coal Company or anybody else. Everybody knows that the Imperial Coal Sales Company, Inc., is nothing but an agent, and it is sold in its name as agent.

Q. I will ask the stenographer to read my question again and will ask Your Honor to require the witness to answer the question.

(Question read.)

A. I don't know how to answer that, except to say that our principal could just write on the bottom of the contract "approved, Imperial Colliery Company".

Q. Is that the only manner in which it would be used?

[fol. 33] A. I don't know whether that would be satisfactory to the purchaser or not.

Q. Is that generally done?

A. In very many cases where the orders are large it is done.

Q. All orders and books of account are kept in Lynchburg, are they not?

A. Yes, our books are nothing but a record of our business.

Q. You keep the bank account here?

A. Yes, I have a bank account and when the capital is idle it is in the bank.

Q. In whose name is that bank account kept?

A. The Imperial Coal Sales Company, Inc.

Q. Who draws the checks on that account; the officers of the Sales Company?

A. Yes.

Q. You said, I think, that the coal was sold to the blast furnace territory in Illinois?

A. Illinois, Indiana and Ohio.

Q. You mean by that that the coal was finally delivered to consumers in those territories?

A. Yes, delivered to the blast furnaces or delivered to the Lakes and there transported by boats to the consumer.

Q. Contracts of sale are always approved at the Lynchburg office, are they not?

A. Sometimes they are and sometimes they are not, it depends upon the contract and who makes it.

Q. Is it not a fact that 90% of the coal that is sold is sold under contract which has been approved by the Lynchburg office?

A. Approved by Mr. C. Lynch Christian, General Manager.

Q. In Lynchburg?

A. Yes, sir.

Q. Is it not a fact that 95% are so approved?

A. I cannot tell you.

Q. Is it not a fact that very small percentage of coal is sold upon contracts made and executed in the Cincinnati office?

A. No, I don't think so.

Q. What percentage of coal is sold on contracts in Cincinnati?

A. I cannot tell you but most of the by-product coal is sold by Mr. C. Lynch Christian personally, who goes out and sells it and approves it at the time when he sells it.

Q. It is less than 10½ of the sales, is it not?

[fol. 34] A. What, the by-product coal—no, sir, the by-product coal is nearly 50% of the coal sold.

Q. Then I cannot reconcile your statement, or I misunderstood you, or else there is a mistake in the testimony. Mr. Morris, will you read my question and his answer with respect to the percentage of coal sold upon contracts approved at the Lynchburg office?

(Said evidence is read by the reporter.)

Q. Now you say there is more than 50% that is approved by the Lynchburg office?

A. I did not say any such thing, if I did, I did not intend to do it. I told you that more than 50% of the by-product coal was sold by Mr. Lynch Christian. I said that the by-product coal was all sold by Mr. Lynch Christian individually either in Providence, Rhode Island, or in the northwest territory, I forget about that, and he approves the contracts himself at the time that he sells the coal.

Q. What percentage of your sales are sales of by-product coal?

A. I cannot tell you, I suppose though from 50 to 75 per cent.

Q. And one-half of that is sold on contracts executed by Mr. Lynch Christian in the Cincinnati office?

A. No, the last one he executed was executed in Chicago.

Q. Upon contracts executed elsewhere than in Lynchburg?

A. Yes, elsewhere than in Lynchburg. We do not do anything here but keep our books, if you want to know.

Q. What other coal do you sell other than what is called by-product coal?

A. Splint coal, smokeless coal, and every kind of gas coal anything that people want to buy we are agents for.

Q. So that according to your estimate you are selling 75 per cent of your total products on contracts approved at the Lynchburg office?

A. I have not said that, Mr. Miller, I don't know, but there is no reason for you and I to be fencing here about this thing. The view I take of this thing is that capital invested

in business or used in business, or in business, is capital that you cannot split it up as a unit, and——

By Mr. Miller: One minute, I object to that.

A. (Continuing:) We do not own any coal and never have [fol. 35] bought any coal and you cannot come in here and separate one of those elements of our accounts receivable and tax it, that is the law.

By Mr. Miller: I object to his answer.
By Mr. Caskie: He has not finished his answer.

A. Mr. Lynch Christian personally sells 50 to 75 per cent and approves the contracts where he sells it. Mr. Lynch Christian lives in Lynchburg, but he does not approve the contracts in Lynchburg, sometimes it is in Providence or Chicago.

By Mr. Miller: I object to the testimony of the witness just given, in that it is an expression of opinion and deals with matters of law and not of fact, and I ask that it be stricken from the record.
By the Court: So far as it deals with matters of opinion it will be stricken out.
By Witness: If Your Honor please, I think I have the right, being somewhat of a lawyer, to state why I have not paid this tax.
By the Court: I did not have that in mind.
By Witness: I just wanted to state why I did not pay this tax.
By the Court: If you wish to testify as an expert on the subject, you can do so.

By Mr. Miller:

Q. Are you introducing yourself as an expert witness on the question of law?
A. No, sir, not on the question of law, but I think I have got a right to construe that law, and I am going to tell you why I did not pay that tax, because that tax is a unit, and Section 73 of the Virginia Code is a unit and we never have any goods in Virginia, and you cannot segregate the second or third element from that statute capital as a unit, you cannot segregate that unit and tax me on my accounts.

By Mr. Miller: I object to the testimony of the witness for reasons just given and move that it be stricken out.

By the Court: I will allow it to remain in the record and the matter may be discussed in the argument.

By Mr. Miller: I desire to except.

[fol. 36] Q. I think it important, Judge Christian, to find out just what percentage of contracts are finally approved in the Lynchburg office and I would like for you to state the percentage of tonnage of coal sold upon contracts approved at the Lynchburg office?

By the Court: Why is it material where the contracts are approved, whether in Lynchburg or outside of the State?

By Mr. Miller: I want to show just what business was done in Virginia and what business was done outside of Virginia.

By the Court: The question of where the contract was approved does not seem to me to affect that.

By the Witness: Mr. Miller, I have not done any business in Virginia. As I understand the law, contracts in Virginia for coal sold in Virginia, I would not suppose we have sold 20 cars a year in Virginia, we do not sell any coal in Virginia.

By Mr. Miller: I object to the testimony of the witness insofar as he states what his understanding is as to the law and move that it be stricken out.

By the Court: He has stated as a matter of fact, whether he sold any coal in Virginia, or not, and I overrule the motion.

By Mr. Miller: Will Your Honor allow me to ask the witness the percentage of coal sold on contracts approved in Virgina?

By the Court: I do not see where that is material, where the contract is approved.

By Mr. Miller: I desire to except.

By Mr. Miller:

Q. Are all contracts sent to the Lynchburg office?

A. Yes, all contracts are filed in the Lynchburg office and copies of them are sent to the purchaser, and the originals are filed in the Lynchburg office.

Q. These include contracts sold by Mr. Lynch Christian?

A. Yes, sir, brought by Mr. Lynch Christian on the train

to Lynchburg and filed in the Lynchburg office where all of our records are kept.

Q. Who invoices the consumers for the coal?

A. When the coal is shipped, the shipping clerk at the mines——

Q. Cannot you just answer that and give the name?

By the Court: He is telling you.

[fol. 37] By Witness: I do not understand you.

By the Court: Answer the question, Judge.

A. When the coal is loaded on the cars and tagged the shipping clerk sends notice to the railroad and to the purchase- and sends a copy to the Cincinnati office and a copy here to Lynchburg, if it originates in the Cincinnati office.

Q. Have you got any copies of those notices sent out by the shipping clerk?

A. No, they are at the mines.

Q. Have you them in your office?

A. No.

Q. Have you any copies at all in your office of any such notices?

A. I don't know whether we have, or not.

Q. Can you find out?

By Mr. Caskie: I object to that because it has nothing to do with the case.

By the Court: I do not see the materiality of it.

By Mr. Miller: I desire to except.

By Mr. Miller:

Q. Does the purchaser make payments as the result of the receipt of such notices?

A. No, sir, Mr. Buck Bryan puts that down on the book in the office.

Q. Where?

A. At Lynchburg, at least he or Miss Rode put it down on the book at Lynchburg, and just before the 20th day of the month they make out an account and send it to the purchaser so that he will have his check in by the 20th of the month and pay for the coal.

Q. Mr. Bryan and Miss Rode are acting in that capacity as agents and officers of the Sales Company, are they not?

A. Yes, they are employees of the Sales Company.

Q. Have you got copies of the notice that they send out on the 20th of the month?

A. It is nothing but an ordinary bill like any other man would make out in a mercantile business.

Q. It is billed from the Imperial Coal Sales Company from its head office in Lynchburg, is it not?

A. Yes, it is made out debtor to them.

[fol. 38] Q. And that money is payable at Lynchburg?

A. Yes, sir.

Q. And it is actually paid to the Lynchburg office and the money put in the bank to the credit of the Coal Sales Company?

A. No, sir, it is paid at Lynchburg and put in the office and just as soon as the 20th of the month comes it is paid to the Collieries Company.

Q. You mean you send the check of the consumers remitted to you direct?

A. No, we collect it ourselves. It is deposited in Lynchburg, in the Lynchburg bank and stays there until the 20th of the month and then it is paid over with a statement of the amount of coal shipped and sold by the various colliery companies and a check is sent to the various colliery companies, it is never a part of the property of the Imperial Coal Sales Co.

By Mr. Miller: I object to the testimony of the witness on the ground that he is giving a conclusion of law and not a statement of fact.

A. I am stating it as a fact. It is there to our credit but it belongs to our principal.

By Mr. Miller: I object to the statement insofar as it states to whom it belongs.

By the Court: I think it is a question of fact and I overrule the objection.

By Mr. Miller: We desire to except. I think it is material to show how checks are received, and that they are actually payable to the Sales Company.

By Witness: Yes, the proceeds of the coal, when it is paid in money is deposited in the bank in the name of the Imperial Coal Sales Company but it does not belong to the Imperial Coal Sales Company because it has got to pay for the coal on the 20th of the month.

By Mr. Miller: I make the same objection to the same statement of the witness.

By the Court: Same ruling.

By Mr. Miller: I desire to except.

Q. When it is paid in checks it is treated in the same fashion as it is when it is paid by money?

[fol. 39] A. We never receive any money, we never get any money in cash.

Q. Will you read the witness' statement?

(Said statement is read.)

A. I should not have said that.

Q. It is all received by check?

A. Every dollar is received by check, and deposited in the First National Bank of Lynchburg to the credit of the Imperial Coal Sales Company, Inc.

Q. To whom are the checks payable?

A. To the Imperial Coal Sales Co., Inc.

Q. Does the Cincinnati office, or any representatives of the Cincinnati office have any right to draw upon that fund?

A. No, they never have had any right to draw upon that fund at all. Sometimes the Coal Sales Company cannot draw upon it, unless they borrowed money from the bank to do it, because they haven't got money enough to pay for all the coal they owe the companies.

By Mr. Miller: I desire to add this to my objection to the statement of the witness that the money was not the property of the Sales Company. I object to such a statement for this additional ground, that it is a violation of the stipulation of counsel. We have stipulated that the items constituting capital assessment was the property of the Sales Company and the money on deposit constitutes a part of that taxable capital and I again move, for this additional reason, that his statement as to the ownership of it be stricken from the record.

By Mr. Caskie: The stipulation was for the purpose of this suit, we waived it for this suit.

By Mr. Miller: The witness is testifying in this suit for the purpose of this suit and I cannot see how his testimony can be taken in any other manner than in violation of the stipulation.

By Witness: If that is the intent and purpose of the stipulation it is contrary to the facts and the Sales Company cannot agree to it. That is not a fact, the proceeds of those checks are no more the property of the Imperial Coal Sales Company than they are the property of Your Honor.

By Mr. Miller: I have been misled into making the stipulation and I ask permission of the Court to withdraw from any such agreement and that we start afresh in the trial of this case.

[fol. 40] By the Court: Very well, the stipulation will be disregarded.

By Mr. Miller: I move at this time for a new trial of the case. The stipulation was agreed upon with a view of facilitating the trial of the case and we have gone over the testimony in chief of the chief witness and cross examination is almost finished and we have got to start afresh. I do not see any way to do except start with another new record, and I ask the Court to allow the case to be reheard de nova from this point.

By Mr. Caskie: That stipulation was made with Mr. Miller and we waived that point for the purpose of this suit. He is bringing out this evidence, we did not, because it is stipulated that we should not do it. We are not making any defense on it, and he asked the question, we didn't ask it.

By Mr. Miller: I think the record will show that the question was not asked by me, but that the testimony was moved to be stricken from the record.

By the Court: The only thing I see to do is to disregard the stipulation and proceed to ask any question you want to ask.

By Mr. Miller: The difficulty is that the plaintiff has the burden of proving his case, and I am in the position of cross-examining the witness about one of the items that he should have proved in his examination in chief.

By the Court: What difference does it make who brings it out? What the Court wants is the truth and the facts and you can develop it as you please.

By Mr. Caskie: We are not defending on that ground.

By Mr. Miller: Do I understand, Mr. Caskie, and Judge Christian to be in accord? One says they are standing on that ground and the other says he is not.

By Mr. Caskie: We are in accord, we are not making any defense on that account.

By Mr. Miller: Will your Honor strike that from the record as being in violation of the stipulation?

By Witness: If Your Honor please, the only question in this case is whether or not the proceeds of these coal companies are in the State of Virginia and the property of these people.

By the Court: We have not reached the point of argument yet.

By Witness: Therefore my whole defense is put upon that ground. I stated it half a dozen times, we are merely [fol. 41] agents for these people and I have tried to explain that fact to Mr. Miller.

By Attorney Christian: May I ask Mr. Miller what is the purpose of his examination of the witness along the line of who the checks are made payable to, &c., in view of the fact we are not defending on that ground, but solely upon the ground that these accounts are the proceeds of interstate commerce.

By Mr. Miller: I think it is material to understand the reason for that. My reason is to show specific acts that are done in Virginia, namely: That depositing the money, drawing checks, keeping accounts and those things are material and I have not attempted to ask the witness whose property it was and whose money it was, and that is the distinction, and that is the reason I was asking him in whose name the money was deposited and who received the checks and who they were payable to. I am not concerned so much with the difference between the Sales Company and the Colliery Companies, rather than it was paid to and received by the Virginia concern.

By the Court: That has all been brought out.

By Mr. Miller: But the witness went further and said it was the property of the Colliery Companies and I say that was not responsive to my inquiry and was in violation of the stipulation.

By the Court: Let that be striken out if you are not defending on that ground.

By Witness: That is the sole ground upon which I refused to pay the taxes, that it is interstate commerce. It cannot be interstate commerce if it ever becomes a part of the general mass of funds in Virginia.

By Mr. Miller: I object to that statement for the same reason.

By Witness: I am not putting that down in the record.

By Mr. Miller: Mr. Morris is putting it down, I hope, I want it all in. Will Your Honor rule on my motion? I moved the Court that Judge Christian's statement as an opinion of law given by him in his statement be stricken from the record.

By the Court: He is not defending on that ground.

By Mr. Miller: I am referring to his last statement, and I will ask that it be read to Your Honor.

(Said statement is read to the Court.)

[fol. 42] By Mr. Miller: I move that be stricken from the record as being purely a matter of law.

By the Court: That is a question of law that the Court will have to decide and you may proceed with the case.

By Mr. Miller: I take it Your Honor strikes that from the record?

By the Court: Yes.

By Mr. Miller: That is all.

By Mr. Caskie:

Q. You were asked in reference to making contracts. I want to re-state what I understood to be your evidence. As I understand it, contracts for any considerable amount of coal must be approved——

By Mr. Miller: I object to Mr. Caskie giving a resume of the witness' testimony.

By Mr. Caskie: Then I will withdraw it.

Q. Contracts for coal, practically all, have to be approved by Mr. Lynch Christian?.

A. Yes, in most instances.

Q. Is it necessary that these contracts should be approved by him in the Lynchburg office or elsewhere?

A. No, he can approve them anywhere he makes them.

Q. In the case of by-product coal, which you stated was sold by Mr. Lynch Christian personally, were such sales of such coal made by him in Lynchburg or elsewhere?

A. Made generally in the West, or in Providence, Rhode Island.

Q. In such cases are those orders approved in the office in Lynchburg?

A. No, but he brings them back and puts them on the file.

Q. He simply brings them back and files them?

A. Yes. If he has some doubt about the contract, whether or not the price will be satisfactory to the shipper, he consults with them sometimes and gets their approval of them.

By the Court: Let the Court understand one thing before Judge Christian leaves the witness stand. Do you wish now in the light of what has occurred to have it understood that the stipulation be entirely disregarded?

By Mr. Miller: I understood it was left in.

By Mr. Caskie: That is my understanding also.

[fol. 43] Q. I would like to ask you again in view of the questions asked by the attorney for the Commonwealth, does your company own any coal which it sells?

A. No, it does not own a pound of it.

By Mr. Miller: I object to that.

By the Court: He has already gone over that.

Witness stands aside.

By Mr. Caskie: We want to introduce at this point as Exhibit "C", Exhibit "A" on page 4 of the former record. We also want to introduce as Exhibit "D", Exhibit "B" as found on page 5 of the former record.

We also want to introduce as Exhibit "E", Exhibit "D" as found on page 8 of the former record.

(Said Exhibits are here filed, marked accordingly, and are as follows:)

EXHIBIT "C"

Commonwealth of Virginia, Department of Taxation

Richmond, June 5, 1931.

Imperial Coal Sales Co., Inc., Lynchburg, Va.

GENTLEMEN: Referring to Mr. Morrisett's letter of the 2nd instand, addressed to your accountants, Tults & Wells,

please be advised that the Department will now proceed to adjust your capital returns as follows:

| | 1928 | 1929 | 1930 |
|---|---|---|---|
| Cash | 1,033.75 | 11,494.86 | 397.48 |
| Excess of Receivables over payables | 84,892.72 | 63,636.68 | 40,876.51 |
| Total | 85,926.47 | 75,131.54 | 41,273.99 |
| Credit will be allowed for the classification of money @ 20¢ per $100 as follows: | 670.00 | 11,194.00 | |

[fol. 44] Please see that your 1931 capital return is prepared on the above basis.

Very truly yours, Department of Taxation, by H. T. Leake, Auditor.

HTL-S.

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EXHIBIT "D"

Commonwealth of Virginia, Department of Taxation

Notice of assessment of taxes on intangible personal property and incomes resulting from audit for the Tax Assessment year of 1930.

Richmond, June 19, 1931.

Imperial Coal Sales Company, Inc., Lynch Building, Lynchburg, Va.

| Page and Line No. | Subject of taxation | values |
|---|---|---|
| 56c4 | 1928-1929-& 1930 Capital | 202 332 00 |
| | By credit Money | 11 864 00 |
| Taxes assessed | | Total amount due |
| 1 603 42 | | |
| 23 73 | | 1 579 69 |

EXHIBIT "E"

Commonwealth of Virginia, Department of Taxation

Notice of assessment of Corporation Income Tax for calendar year 1930, or for fiscal period ending in 1931, if so indicated below.

[fol. 45] Richmond, June 5, 1931.

Imperial Coal Sales Company, Inc., Lynch Building, Lynchburg, Virginia.

| Page and Line No. | Net income subject to tax |
|---|---|
| 209c13 | 5 277 91 |
| Amount of tax: | Total amount due |
| 158 34 | 158 34 |

See our letter dated 6/2/31.

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DECISION

By the Court: Gentlemen, I have listened very carefully to the evidence and argument in this case, and I realize the great importance, both to the Commonwealth and to the Defendant. It does seem to me, however, getting back to the fundamental principles, that the State has no power to tax or burden interstate commerce, and believing it to be true from the evidence in this case, that there is no business done by this corporation except interstate commerce business, the Court feels obliged to conclude that the taxes attempted to be imposed by the State of Virginia both on the income and on the capital of this corporation are invalid, therefore, the relief will be granted as asked for.

By Mr. Miller: Counsel for the Commonwealth notes an exception to the decision of the Court.

By the Court: Very well.

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JUDGE'S CERTIFICATE

I, Don P. Halsey, Judge of the Circuit Court of the City of Lynchburg, Va., who presided over the foregoing trial,

do hereby certify that the foregoing is a true and correct stenographic copy of report of the stipulation of counsel orally made at the bar at the trial of the case and of all the testimony that was introduced, and other incidents of the trial therein, including all exhibits or other writings introduced in evidence or presented to the trial Court, all questions raised and all rulings thereon, in the case of Imperial Coal Sales Company, Inc., vs. Commonwealth of Virginia, tried in the Circuit Court of the City of Lynchburg, Virginia, on the 29th day of January, 1932, and it appears in writing that the attorneys for the plaintiff have had reasonable notice of the time and place when this report of the testimony and other incidents of the trial [fols. 46 & 47] would be tendered and presented to the undersigned for certification, which is certified within sixty days after final judgment.

Given under my hand this 29th day of February, 1932.

Don P. Halsey, Judge.

I, H. H. Martin, Clerk of the Circuit Court of the City of Lynchburg, Va., do hereby certify that the foregoing stenographic copy of report of testimony and other incidents in the trial of the case of Imperial Coal Sales Company, Inc., vs. Commonwealth of Virginia, was filed with me as Clerk of said Court on the 29th day of February, 1932.

Hubert H. Martin, Clerk.

Clerk's certificate to foregoing transcript omitted in printing.

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[fol. 48] In Supreme Court of Appeals of Virginia

Commonwealth of Virginia

v.

Imperial Coal Sales Company, Inc.

From the Circuit Court of the City of Lynchburg

All of the Justices present.

Opinion by Justice H. B. Gregory, Richmond, Virginia—January 12, 1933

The commonwealth of Virginia applied for and obtained a writ of error to a judgment of the circuit court of the

city of Lynchburg, whereby the defendant in error, the Imperial Coal Sales Company, Incorporated, was exonerated and relieved from the payment of state taxes upon its capital, and upon its income.

There is no disagreement between the parties as to the facts involved and they may be stated thus:

The defendant in error, which will hereafter be referred to as the sales company, was assessed with a capital tax under section 73 of the Tax Code of Virginia (see Code 1930, Appendix, p. 2147), for the years 1928, 1929, and 1930, aggregating $1,579.69, and an income tax, under section 52 of that Code (see Code 1930, Appendix, p. 2143), for the year 1930, amounting to $158.34. These assessments, upon the application of the sales company, were canceled and set aside by the judgment here under review.

The sales company is a domestic corporation with its principal office in Lynchburg, Va., but it maintains a branch office in Cincinnati, Ohio. It conducts a sales agency, and [fol. 49] its sole business is that of selling coal for foreign coal mining corporations, whose business and mines are all located outside of the state of Virginia, to wit, in West Virginia. It not only sells the coal but it directs and manages its shipment and transportation, collects the proceeds of sales, and is paid a commission of 8 per cent. No coal of any consequence is sold in Virginia. It is sold in carload lots, in many other states.

The sales company does not own, conduct, or lease any coal mines and does not mine any coal. None of the coal which is sold is located in Virginia at the time of the sale.

The sales company does not own or operate any warehouses or coal storage yards in Virginia. It does not retail any coal, or buy, or own any coal, but only sells the coal for its West Virginia principals in carload lots, f. o. b. mines, for a continuous journey from the point of shipment in West Virginia to the purchasers, who are located in states other than Virginia. The situs of all the coal at the time of sale is outside of Virginia.

The contracts for the sale of coal are made between the sales company and the purchaser, who knows in every instance the principal, and the kind of coal and the mine from which it is to be shipped. In some instances where

the coal is sold in great quantities, the purchaser requires the principal to approve the contract.

In cases where the coal is not sold by the general manager himself but sold through the Cincinnati office, the contracts are forwarded to the Lynchburg office for approval, as the sales company guarantees the solvency of the purchasers. When the contract of purchase is approved, the Lynchburg office sends orders to the mines for the shipment of the coal, directing the kind of equipment to be used and the routing of same. The records of the [fol. 50] sales to the various purchasers, the price per ton of the coal, and an account with the mines from which the coal is shipped are kept in the Lynchburg office.

Under the contract with the mines, the sales company is required to pay for all coal shipped during the preceding month on the 20th day of the following month. The purchasers, in turn, agree to pay the sales company on the 20th day of the month for the coal shipped to them in the preceding month. The sales company collects the money from the purchasers and it is deposited in bank in Lynchburg. From these proceeds the mines are paid for the coal shipped on the 20th day of each month, less the agent's commission. If the purchasers do not pay for the coal at the time agreed, then the sales company has to advance to the mining company the amount due them for the coal they have shipped.

It was stipulated by counsel for the parties that the property constituting the basis of the assessment on capital, was, on the dates in question, the property of the sales company; and the income assessed was income earned by the sales company, and that the assessments as made are correct if the sales company is subject to any capital or income tax whatever, during the years in question.

In the court below and in this court, the sales company has contended and does contend that it is not assessable with the taxes here in question because (a) the tax statutes referred to, and which will later be quoted, do not authorize the imposition of the taxes and have no application to it, and, (b) if they are applicable to it, the assessments are invalid because the said assessments constitute a direct burden upon interstate commerce in violation of article 1, sec. 8, subsec. 3, of the Constitution of the United States. [fol. 51] The trial court, in its opinion, held that, in-

asmuch as the sales company did, exclusively, an interstate business, the taxes imposed, both capital and income, were a burden upon interstate commerce and therefore invalid, and the order and judgment here complained of followed.

We will first advert to the construction of section 52 of the Tax Code, under which the assessment for income was made, to ascertain whether that assessment was authorized by that section. It reads in part as follows: "Every domestic corporation * * * doing business in this State * * * shall pay for each taxable year a tax to be computed by the department of taxation upon the entire net income, as herein defined, of such corporation, derived from business done, property located or sources in this State. * * *" It is at once seen that the essentials of the statute are (1) that the corporation must be doing business in this state, and (2) the net income must be derived from business done, property located, or sources in this state. If these essentials do not exist in respect of the business done by the sales company, the income tax is not authorized by the statute.

This brings us to the pertinent inquiry of whether or not the sales company does business in this state and has income derived therefrom within the purview of the statute.

The answer must be found by adverting to the undisputed facts. They show, beyond doubt, that in substance, the sole business of the sales company is that of selling coal, under contracts, in interstate commerce.

It is true, by maintaining the Lynchburg office, the sales company, in a limited sense, is doing business in Virginia, [fol. 52] but that business arises out of, is inseparable from and incidental only to, the principal business of selling coal in interstate commerce. The so-called Virginia business is simply one of the necessary results of the interstate business done, upon which the Virginia business is founded and continues, and without which it could not exist. It is a consequence which follows in the chain of events, all others of which take place outside of Virginia. The business done in the Lynchburg office severed from the principal business of selling coal in interstate com-

merce, would be reduced, almost immediately, to nothing. In other words, the real business of the sales company is selling coal in interstate commerce, and not the activities necessary to keep books of accounts, bank accounts, and other clerical work, such as is done in the Lynchburg office.

The test as laid down in Dalton Add. Mach. Co. v. Commonwealth, 118 Va. at page 574, 88 S. E. 167, 171, "to determine whether a foreign corporation transacts such intrastate business as can be reached by state taxation is whether domestic business is substantial in its essence, and whether it may reasonably be separated from its interstate commerce; and the question does not depend upon a comparison of its intrastate with its interstate commerce," applies to the case at bar, and it is clear that this case does not measure up to the test because the so-called domestic business of conducting the office is not substantial in its essence; it is only incidental and it certainly could not be separated from its interstate business. Again at page 571 (88 S. E. 167, 170) of the Dalton Case, "* * * It is the character of the transaction, and not the citizenship of the location of the parties, that determines whether it is interstate or intrastate commerce. The courts will therefore endeavor to ascertain the real character of the [fol. 53] transaction."

Our conclusion is that the sales company does no business in Virginia that "is substantial in its essence" and that "may reasonably be separated from its interstate commerce," and, therefore, authority for the imposition of the income tax in controversy cannot be found in section 52 of the Tax Code, under which the present assessment for income was made. Having reached this conclusion, it becomes unnecessary to pass upon the constitutionality of the income tax.

We now proceed to the capital tax. The view we have taken of the capital tax is that in any event it is invalid because it contravenes article 1, sec. 8, subsec. 3, of the Constitution of the United States, and therefore it becomes unnecessary to pass upon the construction of section 73 of the Tax Code under which the assessment was made. However, it is necessary to refer to the statute which in part is in this language:

"All capital of any trade or business of any person, firm, or corporation, except the capital of any trade or

business which is otherwise specifically taxed or specifically exempt from taxation.

"Capital as used herein is defined as follows:

"First. The inventory of stock on hand, which shall include all materials for use in the business, whether at the place of business, in storage or elsewhere in the State.

"Second. The excess of all bills and accounts receivable over bills and accounts taxable.

"Third. All money on hand and on deposit.

"Fourth. All other taxable personal property of any kind whatever, including all choses in action, equities, [fol. 54] demands and claims, but excluding the property hereinafter specifically mentioned in this section. * * *"

"All capital of any trade or business of any person, firm or corporation" is defined by the statute to mean: First, the inventory, etc.; second, the excess of all bills and accounts receivable over bills and accounts payable; third, all money on hand and on deposit; and fourth, all other taxable personal property of any kind whatever, etc. The assessment made on the capital of the sales company, which appears from the notice of the assessment filed as a part of the record, was based on the money on hand, plus the excess of the bills and accounts receivable over the bills and accounts payable. Nothing was assessed under the "first" and "fourth" headings of the statute. There was no stock on hand or inventory of any tangible personal property as described, in "first" and no property as described under "fourth."

It is interesting to note that section 73 of the Tax Code is found under chapter 7 and its title is "Intangible Personal Property," yet in "first" of section 73, reference is made directly to tangible personal property by the statement "the inventory of stock on hand, which shall include all materials for use in the business," which necessarily means tangible and not intangible property.

What has been said about doing business in Virginia, in connection with the income tax, applies here and in considering this phase of the case it must be borne in mind that the tax sought to be imposed is one upon property which is entirely intangible and which is used wholly and

exclusively in interstate commerce. No part of this property is used in any Virginia transaction whatever. It pro- [fol. 55] duces absolutely nothing in this state. The money in the Lynchburg bank and the bills and accounts receivable in the Lynchburg office, which are the subjects of the tax, are in those respective places, not because of any intrastate transactions, but because of the exclusively interstate business the sales company is conducting. The very creation and existence of this intangible property is traceable, directly to interstate commerce. It is a necessary and inseparable outgrowth of that commerce. It, in fact, is a part of the interstate commerce that the Sales Company conducts.

In passing, it may be well to call attention to section 427 of the Tax Code (see Code 1930, Appendix, p. 2251), not only for the purpose of showing what property is exempt from an ad valorem and income tax but for the additional purpose of showing the legislative policy of the state which seems to be in favor of exempting the sales company, under the peculiar facts in this case, and other like corporations, doing a similar business, from any capital or income tax. When section 427 is read and considered, along with the other related sections, it unmistakably shows a strong leaning and intent on the part of the lawmakers to exclude such corporations as the sales company from state tax action. Section 427, in part, is as follows: "No income tax nor ad valorem taxes * * * shall be imposed upon the * * * capital or other intangible property * * * owned by corporations organized under the laws of this State for any tax year during which such corporations do, or have done, no part of their business within this State. * * *" However, we prefer to rest the decision of the validity of the capital tax here considered upon the broad proposition that it is invalid because it is a burden upon interstate commerce and forbidden by the Constitution of the United States.

[fol. 56] Counsel have referred us to no case, and in our somewhat extensive investigation, we have not found one which is similar to the case at bar. We have carefully considered the cases relied upon by the commonwealth and we do not think they support the constitutionality of the tax here sought to be imposed.

The case of St. Louis & S. W. Ry. Co. v. Nattin, 277 U. S. 157, 48 S. Ct. 438, 72 L. Ed. 830, is not in point. In that case the railway company owned a line of railroad lying partly in Bossier parish, La., also all of the stock of the corporate owner of a bridge over Red river in Bossier city. An ad valorem tax was imposed on the railway company upon all of its property within the taxing district to provide the funds to meet certain road bonds. The court held that, "without doubt a local legislative body, when properly authorized, may lay general ad valorem taxes upon all property within its jurisdiction, including that of common carriers engaged in interstate commerce, without violating the Federal Constitution. That such taxation does not amount to regulation of interstate commerce is settled doctrine."

In that case no capital or income tax was involved. The corporation was doing business in that jurisdiction and had therein tangible assets upon which the tax could be laid. In the case at bar, the facts are entirely different. There is no tangible property in Virginia upon which the tax can be laid. The assessment was made upon intangible property only, described as capital. In the Nattin Case, an entirely different kind of tax was involved.

In Adams Express Co. v. Ohio State Auditor, 165 U.S. 194, 17 S. Ct. 305, 41 L. Ed. 683, and upon rehearing under the same style, 166 U. S. 185, 17 S. Ct. 604, 607, 41 L. Ed. 976, the express company was a New York corporation, transact- [fol. 57] ing an express business throughout the United States, and its total tangible property was valued at about $4,000,000, while its intangible property was valued at about $12,000,000. The tangible property was spread through the several states and in round figures about $25,000 of it was in real estate in Ohio and about $42,000 of it in tangible personal property in the same state. The tax assessed by Ohio was arrived at by the "unit rule," and in determining the value of the property of the express company in the state of Ohio to be taxed, the computation was based upon the entire value of all of the property of the company in the United States, and the value of the Ohio property was arrived at through a form of proportion which the Ohio property bore to the entire property of the company throughout the entire United States. The court said: "Where is the situs of this intangible property? Is it sim-

ply where its home office is * * *, or in the state which gave it its corporate franchise; or is that intangible property distributed wherever its tangible property is located and its work is done? Clearly, as we think, the latter. Every state within which it is transacting business, and where it has its property, more or less, may rightfully say that the $16,000,00 of value which it possesses springs not merely from the original grant of corporate power by the state which incorporated it, or from the mere ownership of the tangible property, but it springs from the fact that that tangible property it has combined with contracts, franchises, and privileges into a single unit of property; and this state contributes to that aggregate value not merely the separate value of such tangible property as is within its limits, but its proportionate share of the value of the entire property. * * * It may be true that the principal office [fol. 58] of the corporation is in New York, and that for certain purposes the maxim of the common law was, 'Mobilia personam sequuntur;' but that maxim was never of universal application, and seldom interfered with the right of taxation. Pullman's Palace-Car Co. v. Penna., 141 U. S. 18, 22, 11 S. Ct. 876 [35 L. Ed. 613, 616, 3 Inters. Com. Rep. 595]. It would certainly seem a misapplication of the doctrine expressed in that maximum to hold that, by merely transferring its principal office across the river to Jersey City, the situs of $12,000,000 of intangible property, for purposes of taxation, was changed from the state of New York to that of New Jersey." The tax was upheld.

It is obvious that the Express Cases have no bearing upon the case at bar. The sales company transacts no business in Virginia and possesses no tangible property here. Another very important distinction is that the tax here imposed was not based on the "unit rule" as was done in the Express Cases. Section 73 of the Tax Code does not authorize any such valuation. In the Express Cases, Ohio, by the Supreme Court decision, was allowed to include the intangible property because there was in those cases a basis or foundation to rest it upon, to wit: (a) Tangible property in that state and (2) substantial intrastate business done there, both of which are entirely lacking in the case at bar.

The sales company relies upon the principles announced in Ozark Pipe Line Corp. v. Monier, 266 U. S. 555, 45 S.

Ct. 184, 185, 69 L. Ed. 439. There the corporation was incorporated under the laws of Maryland and had a pipe line running through the state of Missouri, through which it transported oil in interstate commerce. It had its principal office Missouri, kept its books and bank accounts there; paid its employees in the state from its office, en- [fol. 58a] gaged therein labor to conduct its pumping plants to accelerate the passage of oil and owned and operated automobiles and trucks in connection with its business. It neither received nor delivered any oil in Missouri. That state undertook to assess a tax, styled a franchise tax, under a statute which provided the means of ascertaining the tax. It required every corporation not organized under the laws of Missouri, but engaged in business therein to pay an annual franchise tax equal to 1/10 of 1 per cent. of the par value of its capital stock and surplus employed in business in the state. For the purpose of the tax the corporation is deemed to have employed in the state "that proportion of its entire capital stock and surplus that its property and assets in this state bears to all its property and assets wherever located." The corporation was required to report, giving the amount of its capital stock, the par value and market value thereof and other information as a basis for the computation of the tax. The Supreme Court held the tax invalid because it was a burden on interstate commerce and in the course of the opinion said:

"* * * It long has been settled that a state cannot lay a tax on interstate commerce in any form, whether on the transportation of subjects of commerce, the receipts derived therefrom, or the occupation or business of carrying it on. Leloup v. Mobile, 127 U. S. 640, 648, 32 L. Ed. 311, 314 [2 Inters. Com. Rep. 134], 8 Sup. Ct. 1380; Kansas City, Ft. S. & M. R. Co. v. Botkin, 240 U. S. 227, 231, 60 L. Ed. 617, 618, 36 S. Ct. 261; and cases cited. Plainly, the operation of appellant's pipe line is interstate commerce and beyond the power of state taxation. Eureka Pipe Line Co. v. Hallanan, 257 U. S 265, 272, 66 L. Ed. 227, 231, 42 S. Ct. 101; United Fuel Gas Co. v. Hallanan, [fol. 59] 257 U. S. 277, 66 L. Ed. 234, 42 S. Ct. 105. But the contention in justification of the tax is that appellant is also engaged in doing local business, the basis of such contention being the facts concerning its ownership and use

of property, other than the pipe line, and its various acts and activities within the state hereinbefore recited, and, further, that the purposes for which it is incorporated as declared in its articles, comprehend other activities than that of transporting petroleum, namely, the acquisition and operation of telegraph and telephone lines, dealing in and transporting merchandise, etc.

"An extended review of the decisions of this court dealing with this phase of the subject is not necessary. All proceed from the same principles, but range themselves on one side or the other of the line as the facts do or do not demonstrate that the tax as a practical matter constitutes a burden upon interstate commerce. The facts upon which these former decisions rest, therefore, must be borne in mind in applying them to other and alleged similar cases. If the business taxed is in fact separate local business, not so connected with interstate commerce as to render the tax a burden upon such commerce, the tax is good. An illustration of such a tax is found in New York ex rel. Pennsylvania R. Co. v. Knight, 192 U. S. 21, 48 L. Ed. 325, 24 S. Ct. 202. * * *

" 'Wherever a separation in fact exists between transportation service wholly within the state and that between the states, a like separation may be recognized between the control of the state and that of the nation. Osborne v. Florida 164, U. S. 650 [41 L. Ed. 586, 17 S. Ct. 214]; Pullman Co. v. Adams, 189 U. S. 420 [47 L. Ed. 877, 23 S. Ct. 494].' On the other hand, in Norfolk & W. R. Co. v. Pennsylvania, 136 U. S. 114, 120 (34 L. Ed. 394, 397 [3 Inters. Com. Rep. 178]), 10 S. Ct. 958, 960, a Pennsylvania tax of similar character, sought to be imposed upon a Virginia railroad corporation was held bad."

[fol. 60] That case in several respects is similar to the case at bar. There, the corporation maintained its principal office in Missouri. It conducted its financial transactions there; engaged and paid from its office a large force of employees; conducted auxiliary pumping stations in the state, and owned and operated trucks and automobiles in its business, but it actually received and delivered no oil in the state, though its pipe line ran through it. Another point of similarity is in the nature and character of the tax sought to be imposed. It is true, the tax was called a fran-

chise tax but in reality, it was a property tax for it was arrived at by taking from the corporation a percentage of its capital and surplus employed in business in the state and to determine what capital and surplus was so employed, it fixed as the method, "that proportion of its entire capital stock and surplus that its property and assets in this state bear to all its property and assets wherever located." So it is seen that, while the tax was called a franchise tax, it was, in reality a property tax. It has been repeatedly held that it is the character of the tax and not the name given it that governs in cases of this kind.

No oil business was done in Missouri and no coal business was done by the sales company in Virginia. In the Missouri case the fact that the general office of the corporation was located there did not render the business done intrastate business and the fact that the general office of the sales company is in Virginia does not change the character of its business from interstate to intrastate. There was no intrastate business done in Missouri. It was all interstate business, just as the buiness of the sales company. The maintenance and conduct of the office in Missouri was only incidental to the principal interstate business of transporting oil.

[fol. 61] The principles of the Missouri case are applicable to the case at bar and we think they show that the tax sought to be imposed upon the sales company is a burden upon interstate commerce and invalid.

Another case relied upon by the sales company is Alpha Portland Cement Co. v. Mass., 268 U. S. 203, 45 S. Ct. 477, 69 L. Ed. 916, 44 A. L. R. 1219. In that case, Massachusetts assessed the cement company with what was termed an excise tax. By reference to the footnote appended to the opinion in the case, the statute, under which the tax was imposed, will be found, and from it is seen that the tax was on income and corporate excess employed within the state. The cement company was a New Jersey Corporation, maintaining an office in Boston, Mass., which was in charge of a district sales manager, with a clerk, where its business activities in connection with the receipt of orders and shipments of goods for the New England States were conducted. The general office of the corporation was in Easton, Pa. The court held that the tax was invalid, quoting with approval this language from the case of St. Louis S. W. R.

Co. v. Arkansas, 235 U. S. 350, 35 S. Ct. 99, 103, 59 L. Ed. 265:

"So far as the commerce clause is concerned, it seems to us that the principles upon whose application the present decision must depend are those set forth in Postal Teleg. Cable Co. v. Adams, 155 U. S. 688, 695, 39 L. Ed. 311, 315, 5 Inters. Com. Rep. 1, 15 S. Ct. 268, 360, where the court, by Mr. Chief Justice Fuller, said: 'It is settled that where by way of duties laid on the transportation of the subjects of interstate commerce, or on the receipts derived therefrom, or on the occupation or business of carrying it on, a tax is levied by a state on interstate commerce, such taxa-[fol. 62] tion amounts to a regulation of such commerce and cannot be sustained. But property in a state belonging to a corporation, whether foreign or domestic, engaged in foreign or interstate commerce, may be taxed, or a tax may be imposed on the corporation on account of its property within a state, and may take the form of a tax for the privilege of exercising its franchises within the state, if the ascertainment of the amount is made dependent in fact on the value of its property situated within the state (the exaction, therefore, not being susceptible of exceeding the sum which might be leviable directly thereon), and if payment be not made a condition precedent to the right to carry on the business, but its enforcement left to the ordinary means devised for the collection of taxes.'"

In that case, the maintenance of the Boston office and work done there were not sufficient foundations on which to base the state tax.

See, also, the principles announced in Cheney Brothers Co. et al. v. Mass., 246 U. S. 147, 38 S. Ct. 295, 62 L. Ed. 632, and the cases there referred to.

In the case of Commonwealth v. Castner, Curran & Bullitt, 138 Va. 81, 121 S. E. 894, 900, this court was dealing with the validity of a license tax which had been imposed upon the company. No property tax was involved. The facts in that case are almost identical with the facts in the case at bar. The most notable difference is that the company was a foreign corporation. It was a coal sales agency dealing exclusively in selling coal from the West Virginia mines to purchasers in states other than Virginia, in inter-

state commerce. This court held that the license tax was invalid because it was a direct burden upon interstate [fol. 63] commerce. In the course of the opinion it was stated that the company is "doing business in this state, * * * but the business in which it is engaged is one that is not subject to state taxation." The commonwealth seeks to avoid the force and effect of this statement, which so strikingly applies to the case at bar, by saying that the tax there was only a privilege tax; that no property or income tax, as is here involved, was before the court. This is true, and, while we are aware of the material difference between a privilege tax and a capital and income tax, yet, we will apply the reasoning and principles there discussed to the case at the bar because we think the business done by the sales company is not subject to state taxation.

From the principles gathered from the cases, it seems clear that a corporation engaged in interstate commerce may be taxed by a state on (1) its real estate and tangible personal property situated in the taxing state, and (2) upon its intangible personal property, if in the taxing state it does intrastate business or has any appreciable real or tangible property. But if it has no real or tangible property and does no intrastate business in the taxing state, it cannot be taxed by that state.

Many other cases may be found in which state taxation in relation to interstate commerce, is discussed, but we deem it unnecessary to prolong the discussion. After a consideration of those we have examined, we are of opinion that, where a capital tax under section 73 of the Tax Code is sought to be imposed upon a person, firm, or corporation, which is doing no intrastate business, but is doing solely an interstate business, and has no appreciable real or tangible personal property in this state, the tax is invalid because it is a burden upon interstate commerce and con- [fol. 64] travenes article 1, sec. 8, subsec. 3, of the Constitution of the United States.

Having held that the pertinent section of the Tax Code (section 52) did not authorize the assessment of an income tax upon the income of the sales company, it will not be necessary to discuss the cases relied upon by the commonwealth to sustain the constitutionality of that tax.

The judgment of the trial court is affirmed.

Affirmed.

EPES, J. (dissenting in part):

I concur in the conclusion of the court that Imperial Coal Sales Company, Incorporated, is not subject to the income tax assessed against it.

I dissent from the conclusion of the court in so far as it holds that the assessment of a state property tax upon the intangible personal property of a natural person or a domestic corporation is invalid merely because he or it uses such property in carrying on an interstate business. Upon principle, I think, such a holding is unsound, and stretches the compass, operation and effect of the Interstate Commerce Clause of the Constitution of the United States far beyond its reasonable intendment. I do not understand that the Supreme Court of the United States has yet gone so far, and I am reluctant to believe that it will go so far. It is true that it has exercised an ingenuity in stretching the compass of this clause which in some instances rivals the ingenuity shown by Queen Dido in stretching the compass of her ox hide; and it may be that this court is correct in its surmise that the Supreme Court of the United States will hold that the mere fact that intangible personal property is used in carrying on interstate business wholly ex- [fol. 65] empts it from any State property tax. As to this I do not essay to prophesy; but until it does so hold, pointedly and unequivocally, I think, this court should adhere to principle and not so hold.

Section 427 of the Tax Code, I think, has no application to a case such as this. It is intended to cover cases in which the person or corporation does not within the state, do any business, not cases in which the person or corporation actively carries on within the state an interstate business.

[fol. 66] IN SUPREME COURT OF APPEALS OF VIRGINIA

COMMONWEALTH OF VIRGINIA

*v.*

IMPERIAL COAL SALES COMPANY, INC.

Circuit Court of the City of Lynchburg

OPINION BY CHIEF JUSTICE PRESTON W. CAMPBELL, RICHMOND, VIRGINIA—January 11, 1934

All of the Justices present.

This case was argued before this court at its November, 1932, term and on January 12, 1933, an opinion was handed down affirming the order of the lower court.

Upon the petition of the Commonwealth a rehearing was granted and the case reargued. Upon mature consideration of the questions involved upon the rehearing, we are constrained to adhere to our former opinion, and the judgment of the circuit court is therefore affirmed.

Affirmed.

Epes and Hudgins, JJ., dissenting.

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[fol. 67] IN SUPREME COURT OF APPEALS OF VIRGINIA

COMMONWEALTH OF VIRGINIA, Plaintiff in Error,

against

IMPERIAL COAL SALES COMPANY, INC., Defendant in Error

Upon a writ of Error and Supersedeas to a Judgment Rendered by the Circuit Court of the City of Lynchburg on the 29th day of January, 1932. (Upon a Rehearing.)

JUDGMENT—Jan. 11, 1934

This day came here the Parties by counsel, and the court having maturely considered the transcript of the record of the judgment aforesaid and arguments of counsel, is of

opinion, for reasons stated in writing and filed with the record, that there is no error in the judgment complained of. It is therefore considered that the same be, and is hereby, affirmed.

Which is ordered to be certified to the said circuit court.

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[fol. 68] Clerk's certificate to foregoing transcript omitted in printing.

Judge's certificate to clerk omitted in printing.

Clerk's certificate to judge omitted in printing.

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[fol. 69] In Supreme Court of Appeals of Virginia

Notice

To Messrs. Caskie & Christian, Attorneys for The Imperial Coal Sales Company, Inc., Lynchburg, Virginia.

In re Commonwealth of Virginia vs. Imperial Coal Sales Company, Inc.

Please take notice that we shall on the 15th of January, 1934, apply to the Clerk of the Supreme Court of Appeals of Virginia for a certified copy of the record in the above case for use in connection with the application to the Supreme Court of the United States for a writ of certiorari in that matter.

Respectfully, W. W. Martin, Henry R. Miller, Jr., Counsel for the State Tax Commissioner.

Legal service of the above notice is hereby accepted this 13 day of January, 1934.

Frank P. Christian, Jr., Jas. R. Caskie, Attorneys for Imperial Coal Sales Company, Incorporated.

[fol. 63] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 7, 1934

The petition herein for a writ of certiorari to the Supreme Court of Appeals of the State of Virginia is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.